No. 46157-9-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

DEZMOND EMESON

Appellant,

vs.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant appeals the Trial Court's dismissal of this suit. This was a clear case of discrimination based on race, national origin and disability and is the reason why RCW 49.60 exists. Appellant, Dez Emeson, a Nigerian born, dark complexion African male over 40 with a thick accent and a survivor of a gunshot wound to the head and brain damage, was a former DOC community corrections officer before he was demoted and unlawfully set up for termination and terminated. The racial/national origin/disability discrimination occurred on a daily basis by DOC management despite complaints to administrators. Besides the intense harassment, Appellant faced constant retaliation.

II. FACTUAL SUMMARY

A. This State Discrimination Case Is Not Subject To *Res Judicata* Related To The Federal Case For Different Claims, Different Facts And Was Not Decided On the Merits.

Under 49.60, Appellant has separate causes of action that were not ruled upon by the federal court and not subject to res judicata or collateral estoppel. In the Federal case, Appellant did not plead any claims under Washington's Law Against Discrimination, RCW 49.60, nor did he plead any causes for Invasion or Privacy. CP 980-985. Judge Bryan did not

make a decision on any of the state law claims, all of which have different legal standards than the federal law he examined. CP 1000-1007. Further, as admitted in the order, the Appellant did not respond to the Federal Motion for Summary Judgment and instead chose to move the Court for an order of voluntary dismissal without prejudice. The Court, without a substantive response, decided sua sponte, to dismiss Appellant's federal case with prejudice. CP 1000-1007.

The federal causes of action dismissed with prejudice were claims of Violation of Title VII of the Civil Rights Act of 1964 and Violation of 42 USC § 1981. Appellant, in this State law action, this present action, did not allege any federal claims. CP 987-992. Instead, Appellant alleged in the State law case (1) Invasion of Privacy, (2) failure to Provide Reasonable Accommodation pursuant to RCW 49.60, Hostile Environment based on Race, National Origin and Disability pursuant to RCW 49.60, (4) Unlawful Retaliation based on Race, National Origin and Disability pursuant to RCW 49.60, (5) Common Law Wrongful Discharge in violation of Public Policy and (6) Actual Discharge. CP 987-992, 994-998. DOC was not entitled to summary judgment of any kind with respect to Appellant's State Law claims. For these reasons, this case should not have been dismissed based on res judicata.

B. Appellant's Claims Were Sufficent To Support Liability.

Prior to new supervisor Suzi Braverman coming to the Parkland office where Appellant was a Community Corrections Officer, Appellant had stellar performance and historic achievements. For example:

- May 15, 2007, Appellant awarded Southwest Region Community Corrections Volunteer of the Year;
- Membership in the National Rehabilitation Association;
- Microsoft Certified personnel;
- Bachelor's Degree from the University of Texas; Master's Degree from LaSalle university;

CP 893-906.

Appellant's performance review before Braverman (2008-2009, 2009-2010) had no performance or behavior concerns and in fact stated "Dez has the highest level of ethics and integrity; he maintains the high ethical standards defined by policy and the Employee Handbook." CP 665-667, Doc. 01060025, CP 666. Appellant's performance review prior to that was also without issues (2007-2008). CP 672. William Frank, a Community Correction Officer 3, was Dez Emeson's lead worker and started working with Appellant in 2007 and remained his lead worker for several years, while Appellant was a community corrections officer 2; this

was prior to being transferred to the Tacoma Criminal Justice Center and new supervisor Phelps and manager Blatman-Byers. CP 290 7:1-4; 8:5-6; 9:2-4. Mr. Franks got along with Appellant in the work place fine, Appellant communicated well and Mr. Franks had no problems communicating with Appellant despite his accent and Appellant enjoyed his job; he was good at his job. CP 292, 14:10-13. Appellant enjoyed his job before Ms. Braverman took over as supervisor. Id. Appellant got along with his team under Mr. Frank's lead. CP 292 16:12-16. After Braverman arrived, Appellant was constantly criticized and Braverman would even hold Appellant in her office for 2-3 hours at a time on a daily basis, "making it impossible for a CCO to do his job effectively." CP 945-946.

Appellant's job was that of a "hands-on" community corrections officer directly supervising and managing a caseload of offenders on community supervision. CP 290, 8:7-10. Mr. Frank testified that Appellant could have improved in his report writing, but that there were many areas where he excelled at his job. CP 291, 10:2-20. Mr. Frank testified that Appellant was a good field officer at the supervision of offenders, which is the heart of the actual job and reason why DOC exists. CP 291, 11:1-4. Mr. Franks never had performance issues with Mr. Emeson that extenuated to the point of documenting performance issues.

CP 291, 11:5-12:4. Mr. Franks confirms that prior to Ms. Braverman arriving at the Parkland unity, Appellant's performance reviews were positive and there was nothing negative in his performance reviews. CP 291, 12:20-13:17.

According to lead worker Franks, when Mr. Braverman arrived as the supervisor, Mr. Franks (the lead and also a Caucasian male) observed that Ms. Braverman holding Mr. Emeson "extremely accountable, more than other people" and "holding him to the letter of the law." CP 292, 16:21-17:9. Ms. Braverman did not do this for any other corrections officer, according to Mr. Frank. CP 292, 17:10-13. Ms. Braverman, in her attempt to set up the Appellant, discarded his previous evaluation dated March 2, 2009, that was submitted by his former supervisor, Mike Robinson, and forced Mr. Emeson to sign a completely new, more drastic review on May 1, 2009. CP 665-667, 756-758. Under Braverman's orchestration, Emeson was labeled as violent for the way he "looked" at her while being falsely accused by her in her office. CP 859. Braverman began watching how Appellant spent his every minute, unlike other employees. CP 790-791. Prior to Ms. Braverman taking over as supervisor, Mr. Franks and the DOC was aware that Mr. Emeson's medical issues and head injury did have an impact on his abilities in certain aspects of the job, but Appellant was still able to do a good and

competent job. CP 292, 17:14-24. Other than struggling writing reports, Appellant's injuries did not impact his ability to do his job. CP 292, 17:17-24. Mr. Franks agreed that if 95% of correction corrections officers were held to the same standard that Ms. Braverman held Mr. Emeson to, mistakes would be found. CP 293, 20:20:17-21:3. As Mr. Franks stated about Appellant in documentation of his performance:

> "No issues except that I don't believe it's professional for her to scrutinize Dez (Emeson) the way she does compared to what I see her doing with others."
>
> She's (Braverman) is holding him (Emeson) to a standard that I know for a fact other CCO's cannot achieve. She quotes policies with him regarding workload and no one else that I know of is meeting the standards.

CP 293, 21:11-16, 137.

Mr. Franks testified that Ms. Braverman's excessive meetings with the Appellant on his performance actually hindered his performance because it took away the time he had to supervise offenders. CP 294, 24:2-8. Braverman initiated an investigation into Appellant's job performance, criticizing him to the "letter of the law" (consistent with testimony of Lead CCO Frank) although there was no justification and the union questioned the investigation (Ex. 95); and forced Appellant onto home assignment. CP 674-684, 715, 760-761, 766-767, 769-770, 772-

774, 776-788, 857 (disciplining Appellant for arresting non-compliant offender). Appellant reported to the investigator that he had sought guidance on the performance issues and sought advice before they became issues, but was ignored; and, that the caseload of all the community correction officers were extremely high and unreasonable. CP 741, 743-745, 926-927. Appellant took full responsibility for the minor mistakes he had made, but this did not stop Braverman's vindictive investigation. CP 747-752. When Emeson was placed on administrative leave, administration packed his belongings because it was their intent for him not to come back as a community corrections officer. CP 754. On April 30, 2009, Appellant filed a Workplace Violence Report against the DOC for bullying behavior. CP 853.

CCO Lead Franks reported in the investigation that Appellant had a couple areas to improve in "like everyone else." but that he predominately did a good job as a community corrections officer and had many good qualities, and that Braverman was being excessively critical of him. CP 674-684. Prior to supervisor Braverman, Appellant was never criticized for losing his temper or not getting along with other co-workers; Appellant's previous supervisor was not overly critical of him. CP 294 25:22-25, CP 295 28: 10-16. Mr. Franks also made mistakes with issuing warrants for offenders, but unlike Mr. Emeson, he was not criticized,

investigated or disciplined for this, as Appellant was. CP 297 35:24-36:2. On August 1, 2009, Appellant complained of Braverman's discrimination to the Department of Labor and Industries, including complaining of "being ridiculed in front of staff, employment decisions based on stereotypes about his abilities and traits, etc." CP 948-949. On October 4, 2009, Appellant filed a discrimination complaint with the Washington Human Rights commission, alleging national origin/disability discrimination, highlighting that he had been subject to unreasonable scrutiny, bullying, ridicule and derogatory comments about his disability. CP 970. On October 21, 2009, Appellant filed a national origin/disability complaint with the EEOC. CP 972.

On January 29, 2010, DOC Human Resources acknowledged that Appellant complained that DOC had discriminated against him since March 2009 and that his supervisor (Braverman) treated him "less favorably than similarly situated coworkers outside of his protected class by subjecting him to increased scrutiny, denying him breaks, intimidating, bullying, ridiculing in front of coworkers, denying time off to attend medical appointments and making derogatory comments about him and his disability." CP 612-614. Appellant reported to DOC that Braverman was "abusing and stressing him," and alleging that his reasonable accommodation was denied and that his supervisor was making

disparaging comments about him and his disability. CP 612-614. As early as On May 8, 2009, Braverman issued a written reprimand of Appellant for not adhering to his approved work schedule. CP 861-862. Appellant complained to management on May 19, 2009, that he was being "singled out and that Braverman took every conversation with him out of context to construe him as argumentative. CP 828-832. Appellant was made eligible for Family Medical leave Act on February 18, 2010, ending his administrative leave and then released from his position as a community corrections officer on February 26, 2010, based on his medical condition. CP 714, 834, 836, 879-887.

Appellant informed DOC that he had a doctor's note permitting him to return to work. CP 889. On Aril 26, 2010, Appellant was transferred to the Tacoma CJC as a receptionist, as part of a "reasonable accommodation." CP 563-565. On May 13, 2010, independent witness Hester Paige witnessed manager Blatman-Byers and Office supervisor Sandy Phelps yelling at Appellant in the office. CP 647. It was also noted this day that Appellant was not given an updated "desk manual:" on how to do his position. CP 891. Ms. Paige testified that manager Phelps "never talks to Dez, she just yells at him; if Dez does one thing wrong, Ms. Phelps is on him." CP 647. Paige observed that Appellant was doing his job competently, but would be constantly accused by management of

other employee's failings. CP 647. On this same day, May 13, 2010, Appellant filed an Internal Discrimination Complaint alleging that Phelps was harassing, bullying, shouting, humiliation, retaliation, etc. CP 652. Emeson complained:

> She abuses me and appears to misuse her power with constant invalid criticism daily; she blames me for everything without factual justification. Harasses me constantly: excessive monitoring, being treated differently than the rest of my work group, being shouted at and humiliated in front of offenders. My supervisors appear to target me for disciplinary action, by repeatedly finding fault with my job performance, constantly changing work goals with unreasonable actions, which are intended to intimidate me. This happens daily and it is stressful.

CP 654-655. Appellant filed a Workplace Violence Report against Blatman Byers and Phelps for their constant workplace bullying and hostile conditions on May 13, 2010. CP 908-909.

The receptionist/office assistant position at the CJC that was forced on Appellant was in direct contrast to the reasonable accommodation approved by his medical doctor, where DOC HR specifically stated that Appellant should not be in a position that required a lot of "multi-tasking and frequent interruptions and shifting priorities, nor a position that is highly stressful." CP 853. Appellant's physician, Lisa Corthell, M.D., specifically rejected Mr. Emeson from working as an office assistant

because "elements of this job description do not take into account Mr. Emeson's limitations due to his traumatic brain injury." CP 978. Dr. Corthell further referred the DOC to the "ability to multi-task, prioritize and complete work assignments in a fast-paced deadline oriented environment and effectively handle highly stressful, adverse situations, making good decisions and working calmly and accurately." CP 978. Despite Dr. Corthell not recommending this the office assistant position, DOC forced Appellant into the position, essentially setting him up for failure and termination. Id.

On May 18, 2010, Ms. Paige learned that manager Phelps was making fun of Appellant's disability on Facebook when Ms. Paige's former boss informed her of the Facebook posting; Ms. Paige complained about this to Eldon Vail, DOC's Secretary and highest authority. CP 732-733. Appellant filed a grievance against Phelps regarding the "Facebook fiasco" on May 25, 2010. CP 931. On July 14, 2010, Manager Blatman-Byers acknowledged that Appellant complained to her about DOC not working with him in consideration of his disability. CP 583, Doc. 01030055. Two days later, on July, 16, 2010, Supervisor Phelps emailed manager Blatman-Byers her "secret, non-requested" daily notes critical of Appellant from May 18 through July 16, 2010, proving Ms. Paige's testimony that Phelps and Blatman-Byers were setting Appellant up for

termination all along. CP 585-591. Appellant filed a grievance against Phelps and Blatman-Byers on July 21, 2010. CP 929

Gregory Montague, a community corrections officer 2, worked with Dez Emeson with the DOC at the Tacoma Criminal Justice Center (CJC), after Appellant was transferred there to be a receptionist as part of his "reasonable accommodation." CP 302 5:7-22. Mr. Montague confirms that while working with Appellant, Appellant was "soft-spoken most of the time" and not problematic. CP 305 17:13-17. He never observed Mr. Emeson acting improperly or unprofessionally at work and was competent at his job. CP 306 18:5-14, 19:2-9.

Anglelan Morton, was the workplace diversity consultant for DOC and "investigated" Appellant's internal discrimination complaint. CP 310 4:18-5:3. Ms. Morton and her unit has been involved in investigating 200-300 discrimination complaints for the DOC in the past 7 years. CP 311 6:10-19. Out of the hundreds of investigations that the workplace diversity" unit of DOC has investigated, Ms. Morton could not recall any investigations where the unit had actually found there to be a discriminatory or hostile environment based on race or discrimination within the DOC. CP 311 6:24-8:1. Ms. Morton agrees that it is rare or very occasional for the DOC to conclude through its internal investigations that discrimination had, in fact, occurred. CP 311 8:8-21.

According to Ms. Morton, she would need four to five witnesses to verify discrimination before there is a positive finding of discrimination. CP 311 9: 10-18. She acknowledges that harassers who discriminate without being surrounded by witnesses typically deny all wrongdoing. CP 312 10:1-7. Ms. Morton confirms that Appellant complained in October of 2010 of race and disability discrimination, through internal discrimination complaints, which she investigated. CP 312 11:11-12:10. Morton opened an Internal Discrimination Complaint on October 14, 2010. CP 911-916. Emeson gave her "examples of how he was being treated differently or disparately." CP 312 12:20-13:20. Ms. Emeson also interviewed other witnesses that corroborated Mr. Emeson's allegations of discrimination. CP 312 12:24-114:14. A witness confirmed to Ms. Morton that Appellant was not given the proper tools or training to do his job and that he was being set up for failure. CP 313 17:4-18:2. A witness confirmed that Ms. Phelps yelled at Appellant, "chewing him out, and scrutinizing him if he does anything wrong and not allowing him the training or tools to do the job." CP 314 19:3-8.

Ms. Morton confirms that Appellant complained about constant harassment, violent criticisms and that Phelps repeatedly harassed him and found fault with everything he did; Appellant complained that he was being treated differently than the rest of the group. CP 315 P.24. Emeson

described well the racial and disability discrimination he experienced to Ms. Morton, which was confirmed by at least one witness. CP 315, 25:14-26:3. Ms. Morton also confirms that Ms. Phelps acted unprofessionally in disclosing information about Appellant's medical condition and the fact that he was transferring to the CJC under a reasonable accommodation, yet, although transferred, Appellant was denied the scheduling reasonable accommodation he requested in July of 2010 and grieved this decision. CP 313 14:19-15:23, CP 593, 716, 718, 720-721, 723-724, 726. Ms. Morton acknowledges that there is an inherent conflict of interest for her to investigate discrimination complaints by an employee of DOC on behalf of her employer, DOC. CP 314 21:1-8. It is not surprising that Ms. Morton's investigation concluded with "no conclusions" as she could not recall any affirmative investigation where she or her unit found discrimination in seven years. CP 316 29:22-25. Appellant filed EEOC charges for disability and national origin discrimination on October 28, 2010.

Hester Paige was an office assistant at the Tacoma Criminal Justice Center and worked directly with Appellant after he was transferred there as part of his "reasonable accommodation." CP 321 4:17-5:17. Ms. Paige testified that she witnessed Ms. Fitzpatrick approached Appellant in a hostile manner "with her hands in his face" and yelling at him; this

incident took pace on August 4, 2010. CP 322 6:10-21. Ms. Phelps then got involved and encouraged Fitzpatrick to make a report that it was in fact the Appellant that was the aggressor in an attempt to set Appellant up for termination and get him terminated by alleging he was violent. CP 322 6:19-7:22. With supervisor Phelps encouragement, on August 4, 2010, Fitzpatrick alleged that Appellant was "yelling, acting wild, screaming and looked like he was going to swing on her:" and Phelps signed the "workplace violence report." CP 449-500, 505. Prior to this description, Fitzpatrick only described Appellant as loud and aggressive, but over a month later in the investigation she described Appellant as "violent," changing her story.[1] CP 507-509, 521-522. Phelps admits in the investigation that she did not witness the actual altercation, yet she informed the investigator that Appellant had a history of being threatening. CP 526. Appellant complained that these allegations were false, an attempt to get his terminated and that his work environment was hostile. CP 514-516. Office assistant Kim Trimble never observed any observations of Appellant that were threatening. CP 652. Manager Phelps and Blatman Byers later used these false allegations of violence to "phony

[1] Witness David Oberry did not witness Appellant being violent and described the August 4 incident as a mere disagreement. Ex. 10. Another witness, Kim Trimble states that both Fitzpatrick and Appellant were talking loudly, but no threatening behavior and that both Appellant and Fitzpatrick are typically quiet. Ex. 12.

up" a workplace safety plan" because Ms. Phelps was "so concerned" that Appellant was a threat to her. CP 649-650.

On August 29th and 30, 2010, Appellant filed an Internal Discrimination complaints with the DOC documenting that Manager Blatman-Byers "engaged in a course of vexatious comments or conduct" that she did not do with Caucasian employees, retaliation as a result of grievances filed against supervisor Phelps, disparate treatment in relation to 1) unreasonable expectations, 2) changes in work goals without notice, 3) bullying, 4) abuse, 5) daily criticisms and monitoring, and 6) humiliation in front offenders and staff. CP 638-639, 954-955. Appellant specifically complained that he was discriminated against because he was "an African American male from African origin." Appellant was forced to take a demotion due to his disability and his supervisor posted his medical condition on Facebook. CP 924, 933. On September 2, 2010, manager Blatman-Byers again accused Appellant of being rude and angry, which he denied and insisted that he be able to have union representation when falsely accused; Appellant filed a Workplace Violent Report on this same date. CP 580-581, 957-958. Appellant filed a Workplace Violence Report against administrator Mendoza on September 15, 2010 for various forms of discrimination based on his race and disability. CP 960-961. Specifically, on September 20, 2010, Emeson complained that he was

compulsory forced into the accommodation to work at the Tacoma CJC, receiving harassment notes when he comes to work and that Fitzpatrick had trashed Appellant's desk. CP 518-519.

Appellant testified that Administrator Mendoza regularly referred to him as stupid and retarded, could not speak English and wanted to give Appellant a "disability separation." Dec. of Ahearn, CP 51:8-16:9; 20:1-12. Bonnie Francisco, HR manager, told Appellant that there was no place a DOC for a person like him due to his disability. Id., at CP 57:4-5; CP 58:16-24. Braverman would repeatedly make racial remarks, repeatedly asking Appellant where he was from or "speak in English" and repeatedly referred to Appellant as "stupid." Id., at CP 63:3-64:13; Dec. of Ahearn, CP 83:6-12. Appellant testified that Administrator Mendoza also referred to Appellant as a "nigger" and swore at Appellant. Dec. of Ahearn, CP 78:9-20: 82:1-2; 87:5-14.

On September 28, 2010, Appellant complained of an ongoing hostile work environment. Emeson Dec, CP 951-952. On September 29, 2010, when Appellant attempted to talk to Blatman-Byers about the ongoing harassment/retaliation, she characterized him as acting violently. CP 636. On September 30, 2010. Appellant reported to administrator Armando that he had previously reported retaliation by his supervisors, was told to report the issues to Manager Blatman-Byers, and faced the

same retaliation from her. CP 610, 634, 121. Phelps, on October 5, 2010, was watching Appellant in an attempt to set him up for termination, criticizing his every move. CP 597-598.

On October 8, 2010, when Appellant attempted to talk to his manager Blatman-Byers about racial/disability targeting by supervisor Phelps, he was not listened to and "shut down in every conceivable way" and ordered to leave her office (three times) in a humiliating way. CP 567, 627-629. Manager Blatman-Byers described the October 8, 2010 meeting with Appellant acknowledged that he complained about Phelps retaliating against him; yet Byers just described Emeson as "angry." CP 569-570. Appellant Emeson refused to sign this PCP. CP 572. On October 12, 2010, Appellant Emeson attempted to address his disability discrimination with manager Blatman-Byers, but was "shut down" to the point that he became upset and was crying and had to go home. CP 608. On October 14, 2010, DOC opened another investigation into Appellant's claims that Blatman-Byers "made repeated attacks against him creating an on-going pattern of invalid criticism blaming him without factual justification, treating him differently from the rest of the work group, humiliating and shouting at him and exposing him to excessive monitoring." CP 616-618, 641-645. DOC knew that Appellant was complaining of race and disability discrimination, manifesting through

"bullying, repeated attacks, invalid criticism, being shouted at, humiliated and excessive monitoring." CP 631-632. DOC denied these allegations. CP 616-618, 620-625. According to Appellant, it was he who was being talked to rudely, being yelled at by his supervisors, being held to a different standard and humiliated. CP616-618. On October 18, 2010, Appellant asked administrator Mendoza when he could be returned to his position as a community corrections officer (based on the approval and recommendation of his doctor) and filed a grievance with administrator Mendoza the same day. CP 605-606, 922. On October 19, 2010, Mendoza was involved in "watching" Appellant, including watching how much time he spent on breaks and lunch, including watching Appellant every hour." CP 695.

On November 5, 2010, Phelps was "keeping tabs" on Appellant through supervisor Kele Wassum, who noted that there was a lot of "tension between" several employees and that "others seemed angry." CP 600, 602-603. Field Administrator Armando Mendoza issued Appellant a "memo of concern" on November 9, 2010, documenting the orchestrated and conspired allegations that Appellant was "hostile and aggressive;" Appellant denied these allegations and described Fitzpatrick as the aggressor (Ex. 6) and even had a witness, Ms. Paige, who reported that it was in fact Fitzpatrick that was "rude, professional and out of line." CP

496-497. On September 15, 2010, Appellant filed a Workplace violence report against Fitzpatrick. CP 963-965. On November 10, 2010, - Appellant filed an Internal Discrimination Complaint for race, national origin and disability discrimination. CP 935-936. On November 16, 2010, Phelps accused Appellant of making unprofessional comments. CP 800. Administrator Mendoza then used these trumped up and false allegations against Appellant to document a conspired "continued pattern of unprofessional behavior". CP 496-497. 502-503. Ms. Paige was a direct witness and verified in this investigation that it was Fitzpatrick that was the aggressor against Appellant with her "hands in the air" (Fitzpatrick also used body language, loud voice, rude and out of line) and that Phelps instructed Fitzpatrick to "get statements." CP 530. As Ms. Paige testified, "from the day that Dez (Emeson) walked in there Ms. Phelps was trying to set Dez up" to terminated him, along with manager Karen Blatman-Byers. CP 322 7:19-8:3. Appellant was given over 50 specific tasks, not given to other receptionist, and was judged to be sufficient in just about all the tasks except with regard to biased descriptions of his attitude by his supervisor Phelps, who described his demeanor as "threatening and intimidating" while Appellant described his interactions with supervisor Phelps as harassment that needed to stop. CP 547-561.

Ms. Paige actually witnessed Manager Blatman-Byers "tell Sandy (Phelps) to watch him, ride him." CP 322 8:10-15. Ms. Paige heard Phelps tell Emeson "you are just not going to make it here," even though Phelps just got into the position of supervisor herself a month earlier. CP 322 8:16-25. Phelps authored a Performance and Development Plan (PDP) shortly after Appellant arrived under her supervision at the CJC where she accused Appellant of having communications difficulties, being rude, being angry and loud, and doing a bad job. CP 563-565, 576, 578. Alternatively, according to Ms. Paige, supervisor Phelps and manager Blatman-Byers talked down and condescending to Appellant "all the time" and continuously insulted his intelligence, talking to him "like he was a two-year old" in front of colleagues and offenders. CP 322 9:17-10:5. According to Ms. Paige, Appellant never acted unprofessionally, even in the face of the discrimination; he never yelled or screamed as he was alleged to do. CP 323 10:12-11:5. Paige testified that:

> "Dez has an accent. So he never yelled or screamed or anything like that. He was very humble. He was very humble, especially from the position he came from. He was a very humble man."

CP 323 11:2-5.

Paige testified that Appellant had an accent and talked using his hands, but that this was a part of his African culture, being a Nigerian

man. CP 323 11:6-18. Paige also confirms that she received a Facebook message where Phelps disparaged Emeson because of his disability and joked about Appellant coming on to the unit, CJC. CP 323 11:20-12:19. Paige confirmed in her testimony that she complained about this Facebook message to Eldon Vail, the Secretary of DOC-highest authority within DOC. CP 323 12:2-19.

Hester Paige confirmed that supervisors made fun of Appellant because of his Nigerian accent, commenting that they did not understand him or that he sounded funny or could not "track and do the job." CP 323 12:20-13:11. At the same time, the supervisors were preventing him the tools to learn the job. Id. And CP 323. In fact, when Paige tried to train Appellant, she was discouraged from doing so; supervisor Phelps told Paige that Appellant could "sink or swim." CP 323 13:12-23.

Paige testified, "they were setting him up for failure, pretty much." Id. This is consistent with DOC putting Appellant in this position in the first place, as the office assistant job involved much multi-tasking and Appellant's reasonable accommodation restricted excessive multitasking, stressful situations. CP 872. Supervisors would discuss their intent that Appellant "was not going to make it" with non supervisory staff; and "they treated him worse than they treated those offenders." CP 324 16:1-28. Staff member refused to greet Appellant and would roll their eyes,

turn their noses up and walk off. CP 324 16:19-25. Ms. Paige verified that she (African American) and Appellant had to essentially seek permission and get approval from supervisor Phelps before using the bathroom or leaving their desk, non-African Americans did not have to do this. CP 324 17:3-23.

In an incident where manager Blatman-Byers alleged that Appellant pointed his finger at her, Paige confirmed that it was manager Byers that made fun of Appellant stating that she did not understand his language (English), manipulating him "like the offenders do in prison." CP 325 20:3-21:6. Appellant never acted aggressively or in a hostile manner to Ms. Byers. CP 325 21:7-20. Paige testified that supervisors would antagonize, harass and degrade Appellant in the lobby full of offenders. CP 325 21:21-22:14. When Paige tried to intervene to stop the harassment, she was yelled at. CP 326 22:15-25. Paige testified that despite his disability, Appellant was able to do his job just fine, but the supervisors and managers "didn't give him an opportunity and chance." CP 326 23:6-23. Even the Administrator Armando Mendoza made fun of his disability and treated Appellant as if he were a kid. CP 326 23:24-25:13. Phelps also talked to Paige about African American men generally in a racially and sexually demeaning way and in fact enlisted Paige's help to go to Las Vegas with an African American lover, despite the fact that

Phelps was married. CP 327 28:7-29:20. Phelps would also spread rumors about Appellant's medical condition and "head injury all the time." CP 327 29:21-30:9.

Correctional Officer and union shop steward Paulette Thompson believe the blatant discrimination against Appellant to be so horrific that she complained directly to supervisor Phelps and to Human Resources that Appellant was being "racially profiled" at the office by his supervisors/management. CP 336 6:13-7:4; CP 339 20:1321:12. Thompson informed Human Resources that Appellant was in a "hostile work environment" and that staff were treating him and referring to him as stupid, as not able to do the job and as an "outsider", instead of trying to help him. Thompson informed Phelps that Appellant was being racially targeted by Phelps, to which Phelps replied that she was only following the instruction of her manager Blatman-Byers. CP 336 7:5-16. Thompson also witnessed Phelps "talking down" to Appellant and also reported that staff were joking about Appellant's disability outside the bathroom at the office. CP 336 8:11-18; 38:10-41:17. Phelps required Emeson to do tasks that she would not require other non-African receptionist to do. CP 336 9:7-11:15. When confronted by Thompson, supervisor Phelps created a book of tasks so it would not appear that she was specifically targeting Appellant, but he was fired before the task book was completed. Id.

Thompson testified that Appellant was often required by Phelps to do demeaning tasks every morning that other receptionist were not, like checking the copy machine for ink and shaking the ink cartridge. CP 337 11:16-12:8. Phelps would chastise Appellant for not informing officers that offenders were reporting in, when Appellant had in fact informed the officers. CP 337 12:18-13:19. As Thompson testified, Phelps "held him on a higher standard than she held other people." CP 337 13:20-25. In fact, other receptionist were permitted to sit at the reception desk and play on their "iPads" or send personal text messages from their phones, while Appellant never engaged in such conduct and was constantly chastised by his supervisor and management. CP 338 14:3-25. Ms. Thompson also reported to Human Resources that staff members were talking in a disparaging way about Appellant, essentially gossiping that he was not competent. CP 339 18:4-19:14. Ms. Thompson testified that DOC is "harder on African Americans then they are with our counter partners." CP 339 19:19-24; 28:8-29:8. The Caucasian management treated and talked to African Americans more harshly and aggressively. Id. Ms. Thompson confirmed Appellant's job requirements were a "moving target" and intentionally changed often so that he would not be successful and that there was already bias against Appellant before he even arrived to work at the CJC. CP 339 21:3-23:3. "I don't think that he was set up for

success, no." CP 340 23:3. Thompson confirms that Appellant never yelled, screamed or used profanity or act in any way unprofessional. CP 340 23:4-18. Thompson also reported that other African Americans were being racially harassed. CP 345 42:10-19.

Sandy Phelps was Appellant's supervisor at the CJC in 2010, when he was transferred there as part of a reasonable accommodation. CP 355:17-5:10. Phelps denies taking any actions to set Mr. Emeson up to fail or to terminate him. CP 356:15-23; 20:2-14. Phelps admits that he made disparaging comments about Mr. Emeson's reasonable accommodation and disability on a social networking website (Facebook). CP 357:25-7:14. Ms. Phelps testified that she did not know that posting comments about Mr. Emeson's reasonable accommodation was unethical (meaning that her actions were negligent, but not intentional). CP 358:15-8:9. Phelps did not understand that she violated Appellant by making web posts about his disability until the Union told her that her actions were inappropriate. Id. Ms. Phelps denies that she ever talked to Appellant in a demeaning way and denies that she held him in her office for hours on a daily basis in an abusive manner. CP 361:1-23. Phelps denies that she refused Appellant union representation during disciplinary meetings with management. CP 362:24-12:8, 367:7-23, 809-810. Phelps denies that she sabotaged Appellant, refused Appellant training, pointed her finger at him

in confrontations or sabotaged his vacation plans. CP 363:5-13:1. Phelps denies yelling and verbally abusing Emeson. CP 364:17-20. Phelps admits she took written notes that were critical of Emeson's work activities, even though no one asked her to do that. CP 365:24-15:5. Phelps admits that she would not allow co-worker Hester Paige to train the Appellant. CP 371:20-22. Phelps denies telling Appellant "you are just not going to make it here." CP 372:14-16. Phelps denies telling Emeson that he had an inability to "track" as far as his thinking skills. CP 376:17-19; 378:9-12. Phelps denies talking to Appellant in a condescending/degrading manner or as if he were a child or stupid in front of offenders. CP 376:8-19. Phelps denies making fun of Emeson's Nigerian accent or taking actions to embarrass him. CP 377:1-5; 29:3-8. Phelps denies forcing Emeson to seek permission to go to the bathroom. CP 379:22-29:2. Phelps denies that she ever harassed Appellant at all based on his race or disability. CP 384:33:21-385:1; 389:13-390:14. These are all material issues of fact that a jury must decide.

On January 6, 2011, Appellant filed another Internal Discrimination Complaint alleging race/disability discrimination with the DOC. CP 938-943. On January 10, 2011, Appellant complained to his administrator Mendoza that he was facing "an endless stream of abuse and harassment since he filed a grievance against Phelps for sharing his

medical condition on her social network Facebook." CP 918. On January 11, 2011, Appellant was put on administrative leave and assigned to home, after filing an EEOC complaint and numerous DOC Internal Discrimination Complaints for discrimination based on national origin and disability. CP 657-663, 545

In handwritten notes dated January 14, 2011, memorializing an administrative meeting to orchestrate Appellant's termination despite his known disability (head injury), the administration actually discussed that they "don't want it to look like we have bullying employees." CP 536-543, Doc 01030006, CP 763-764, 821-826. On January 27, 2011, DOC terminated Appellant from his position as an office assistant. CP 793-794. Appellant appealed this termination with Secretary of DOC Vail and informed Vail of the historic discrimination and retaliation he endured based on his disability and national origin, in an attempt to overturn his termination as a probationary employee as an office assistant. Cp 872. The assistant secretary of DOC validated the termination on March 25, 2011, *despite* Appellant's opposition. CP 526.

Administration knew that whenever Appellant ever complained of discrimination, he was blamed, that his suggestions were dismissed, that he was talked to a way that was disrespectful, that supervisor Braverman learned of Appellant's previous head injury and made his "life living hell."

CP 536-543, Doc. 01030007, 763-764. Appellant also informed DOC administration that when he asked for a reasonable accommodation and DOC sent him to their psychologist, Dr. Ekemo, the psychologist informed Appellant that the DOC had the intention of firing him. CP 536-543, Doc. 01030008, 686-695, 845, 847-851. Dr. Ekemo then drafted a report at the request of the DOC allege that Appellant "was not able to successfully perform some of the essential functions of his job" as a community corrections officer, even though he had done this job successfully for years before Braverman's arrival. CP 694. Dr. Ekemo then recommended the "reasonable accommodation" and Appellant was demoted from a community corrections officer to a receptionist. CP 697, 699, 701. Appellant alleges that this demotion from community corrections officer to and was forced and the Human Resource manager Bonnie Francisco told him "there is not place for people like you at DOC." CP 703-704, 706-708, 710, 838-843.

DOC acknowledges that Appellant's physicians released him to return to his job back as a Community Corrections officer in August and September of 2010 and no longer needed a "reasonable accommodation," but DOC alleged that it did not have any openings for a community corrections officer and denied him. CP 661, 728, 730, 802-807, 817-819, 855, 874, 876-877. DOC Human Resource Consultant Melanie Garrison

knew of open positions, but then emailed the personnel positing the openings and asked whether the positions were "truly vacant, truly funded," and essentially destroyed any chance that Appellant could go back to his previous position. 796-798, 812-813. Appellant informed DOC administration that Supervisor Phelps treated him the same way as supervisor Braverman, that he was being ostracized and put down; everything was made out to be "his fault." CP 536-543, Doc. 0103008-9. "Phelps looks for all wrong for what I do-shouting match." CP 536-543, DOC 01030010. Appellant complained to administration that other employees come and go as they please, yet he is held to different standard; DOC is "trying to show I can't do my job." CP 536-543, Doc. 01030010.

C. Trial Court Proceedings

This case was initially filed on February 8, 2013. The operative pleading is plaintiff's amended complaint, with leave to amend being provided by way of order on December 10, 2013.

On February 7, 2013 the defendant filed an answer. Within its answer DOC asserted a number of included affirmative defenses including the defenses of res judicata and collateral estoppel. After conducting its significant discovery, on December 13, 2013 DOC moved for summary judgment alleging *inter alia* that plaintiff's discrimination claims were barred by the doctrine of collateral estoppel/res judicata because of an

earlier federal lawsuit containing only federal claims which was subject to dismissal. Additionally, the defense asserted with respect to plaintiff's invasion of privacy claim that even if plaintiff could establish such claim it involved intentional conduct which could not be imputed to the employer and other barred because it was not brought within an alleged two-year statute of limitation.

On March 31, 2014 appellant filed a detailed response to DOC's motion for summary judgment challenging whether or not the defendants DOC had met its burden of establishing its affirmative defense of collateral estoppel and/or res judicata. Appellant also provided substantial evidentiary support with respect to his multiple claims for discrimination which had been set forth within his complaint.

On April 11, 2014 defendant's motion for summary judgment came on for a hearing before the Honorable Ronald E. Culpepper, Pierce County Superior Court judge. Following oral argument. Judge Culpepper dismissed plaintiff's discrimination claims based on res judicata. (RP of 4-11-14 p. 22;). With respect to plaintiff's invasion of privacy claim the Superior Court dismissed it based on statute of limitation and the notion that it was a "intentional act" therefore could not be imputed the employer. (*Id.* p. 23-24).

This appeal followed.

III. ASSIGNMENTS OF ERROR

1. The Trial Court erred in dismissing plaintiff's case based on *collateral estoppel and/or res judicata* grounds.

2. The Trial Court erred in dismissing plaintiff's claims on *collateral estoppel and/or res judicata* grounds when an application of such doctrines are violative of public policy in evidenced by RCW 49.60.020.

3. Assignment of error. The Trial Court erred in dismissing plaintiff's discrimination claim to the extent that dismissals were based on the merits.

4. The Trial Court erred in dismissing plaintiff's invasion of privacy claim based on statute of limitation grounds and/or lack of scope of employment".

5. The Trial Court erred in granting defendant's motion for summary judgment.

IV. ISSUES RELATING TO ASSIGNMENTS OF ERROR

Did the Trial Court err in dismissing plaintiff's claims on *res judicata/collateral estoppel* grounds based on a prior federal adjudication

of federal discrimination claims when such claims were never brought in the federal action and the defendant failed to establish that they necessarily "could have" been brought in such an action given the fact that such state law claims could only be filed in federal court under highly discretionary supplemental jurisdiction?

2. Did the Trial Court err in dismissing plaintiff's place on *collateral estoppel/res judicata* grounds when the application of such doctrines would offend the public policies of RCW 49.60. et. seq. and in particular RCW 49.60.20 which appears to permit a discrimination plaintiff to seek multiple avenues of redress?

3. Whether the Trial Court erroneously dismissed plaintiff's claims on *res judicata/collateral estoppel* grounds when the defendants failed to establish their burden of proof as to the elements of such affirmative defenses?

4. Did the Trial Court err in dismissing plaintiff's invasion of privacy claim based on statute of limitation and/or lack of respondent superior when such a claim was based on the disclosure of private medical facts and the previous case is applying a two-year statute of limitation only applied to "false light invasion of privacy claims which are very similar to defamation? Did the trial court commit error by dismissing plaintiff's claim on the defense's contention that the tortuous publication of

confidential medical information was outside of the offending employee's scope of employment?

V. LEGAL ANALYSIS

A. Rules Applicable To Motion For Summary Judgment In Discrimination Cases and Appellant's Disparate Treatment Claims.

When considering a motion for summary judgment all facts must be considered in a light most favorable to non-moving party and all facts submitted and all readable inferences should be construed in such manner. See *Rice v. Offshore Systems, Inc.* 167 Wn. App. 77, 88, 272 P.3d 865 (2012), citing two *Sangster v. Albertson's, Inc* , 99 Wn. App. 156, 160, 991. P.2d 675 (2010). Summary judgment should rarely be granted in employment discrimination cases. Id. In order to overcome a motion for summary judgment in discrimination case there is no requirement that the aggrieved employee produced "smoking gun evidence of a discriminatory and/or a retaliatory intent. See *Rice v. Offshore Systems, Inc.* 167 Wn App. at 89; *Selstead v. Washington Mutual Savings Bank* 69 Wn. App. 852, 860, 851 P.2d 716 (1993). Circumstantial. indirect and inferential evidence is sufficient to overcome an employer's motion for summary judgment in a discrimination case. Id.

The reason why summary judgment is disfavored in employment discrimination cases is because "the decision as to the employer's true motivation plainly is one reserved to the trier fact." See *Lowe v. City of Monrovia* 775 F.2d 998, 9008 – 09 (1985), citing to *Peacock v. Duval* 694 F.2d 664, 646 (9th Cir. 1982). It is well established that the "employer's intent to discriminate is "a pure question of fact to be left to the trier fact..." Id. An employer's true motivation in an employment decision is rarely easy to discern and "without a search inquiry into these motives, those acting for impermissible motives could easily mask their behavior behind a complex web of *post hoc* rationalizations." Id.[2] Because RCW 49.60.020 commands "liberal construction," summary judgment is rarely appropriate in WLAD cases when the evidence contains reasonable but competing inference of both discrimination and nondiscrimination that must otherwise be resolved by the jury. See *Frisino v. Seattle School District No. 1* 160 Wn. App. 765, 777, 249 P.3d 1044 (2011); see also *Martini v. Boeing Co.,* 137 Wn.2d. 357, 364, 971 P.2d 45 (1999); *Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 456, 166, P.3d 807 (2007).

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[2]As Washington's law against discrimination (WLAD) has a specific provision demanding liberal construction similar federal law is only persuasive. See RCW 49.60.020. This is because the statutory mandate of liberal construction requires that the courts view with caution any construction which would narrow the coverage of the law and which would undermine its statutory purposes of deterring and eradicating discrimination in Washington – a public policy of the highest priority. See *Lodis v Corbis Holdings, Inc* 172 Wn App. 835, 292 P.3d 779 (2013). (Rejecting the federally recognized "same actor inference" as being inconsistent with the WLAD."

Because of the lofty statutory purposes of RCW 49.60 et. seq. set forth within RCW 49.60.010 and the command of liberal construction set forth within RCW 49.60.020 the elements of a discrimination claim under the WLAD are straightforward, simple and relatively easy to prove.

The burden of proof for claims under 49.60 is not particularly onerous. A substantial factor test as applies and defined in WPI330.01 is defined in the following terms:

> "A substantial factor" means a significant motivating factor in bringing about the employer's decision. Substantial factor does not mean the only factor or the main factor in the challenged decision. Substantial factor also does not mean that Appellant would not have been (subject to harassment) but for his [religion and ethnicity]."

The substantial factor tests was first adopted in the case of *Mackay v Acorn Custom Cabinetry, Inc.*, 127 Wn. 2d 302, 898 P.2d 284 (1995). As explained in Justice Madsen's dissent in the *Mackay* opinion, under this standard, an employee can prevail on a discrimination claim under the terms of the WLAD, even if, there were otherwise legitimate reasons supporting the adverse employment decisions. *See Mackay* at 315.

The elements of Appellant's disparate treatment claim are set forth within WPI 330.01, which provides:

> Discrimination in employment on the basis of national origin/race and/or disability is prohibited. To establish his disparate treatment claim Appellant has the burden of proving each of the following propositions: (1) that the employer terminated/laid off or took other tangible adverse actions against the Appellant; and (2) that Appellant's c national origin/race/and/or disability was a substantial factor in the employer's decision to terminate/lay off and/or take other tangible adverse actions against the Appellant.
>
> If you find from your consideration of all the evidence that each of the propositions stated above has been proved, your verdict should be for the Appellant on this claim. On the other hand, if either of the propositions has not been proved your verdict should be for the defendant on this claim.

Given the above, it is not particularly difficult for an employee to overcome a summary judgment motion in a discrimination case, for that matter to prove their case at time of trial. As recently clarified in the Washington State Supreme Court's seminal opinion in *Scrivener v. Clark College* – Wn. 2d (9/18/14). Given the utilization of a "substantial factor test" the burden of proof applicable to such claims is far less than that otherwise would be applicable under federal law which is discussed below. As explained in *Scrivener*:

> "Today's review focuses on the pretext prong of the "*McDonnell Douglas* framework". The Court of Appeals

> applied an onerous standard, and we clarify what is required. An employee may satisfy the pretext prong by offering sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is pretextual **or** (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer. An employee does not need to disprove each of the employer's articulated reasons to satisfy the pretext burden of production. Our case law clearly establishes that it is the plaintiff's burden at trial to prove that discrimination was a substantial fact in an adverse employment action, not the only motivating factor. An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable under the WLAD. (Emphasis added) (Citations omitted).

In *Scrivener* the court further elaborated regarding the intent of its holding in *Mackay*, supra:

> In *Mackay* we rejected the proposition that the employer must prove that discrimination was the "determining factor" (i.e. that **but for** the discrimination, the employer's decision would have been different). We reason that to hold otherwise would be contrary to Washington's "resolve to eradicate discrimination, and would work this resolve into "mere rhetoric." We refuse to "erect the high barrier to recovery implicated by the "determining factor standard..." (Citations omitted).

The substantial factor standard not only applies to disparate treatment claims under RCW 49.60. et. seq. but also reprisal claims brought pursuant to RCW 49.60.210, which applies when a party opposed discrimination and/or participating in proceedings designed to eradicate it. See *Allison v Housing Authority of City of Seattle*, 118 Wn. 2d 79, 821

P.2d 34 (1991). In other words a "but for" standard does not apply to such reprisal claims. The same is true with respect to hostile work environment claims brought under the terms of RCW 49.60. et. seq. See *Schonauer v. DCR Entertainment, Inc.*, 179 Wn. App. 808, 820, 905 P.2d 392 (1995) (applying substantial factor test to a hostile work environment claim.)

What distinguishes an RCW 49.60. et. seq. from federal law is that under a "substantial factor" test an employee can still prevail **even if otherwise legitimate reasons exist justifying the employer's actions.** In other words everything an employer my state justifying their actions on legitimate grounds may be 100 percent true, but nevertheless the employee can still prevail if a substantial factor in the otherwise legitimate decision was a protected characteristic or conduct.

See *Johnson v. DSHS* 80 Wn. App 212, 227, 907 P.2d 1223 (1996). Also "pretext" may be established by showing employer's articulated reasons (1) have no basis in fact, (2) were not really motivating factors for its decision. (3) were not temporally connected to the adverse employment action or (4) were not motivating factors in the employment decisions for other employees in the same circumstances. See *Fulton v. State* 169 Wn. App 137, 161, 279 P.3d 500 (2012).

Here, particularly as it relates to Appellant's claim of wrongful termination the showing of a discriminatory intent is strong. It is noted that the seminal *McDonnell Douglas v. Green* case has facts somewhat akin to what transpired here. In *McDonnell Douglas v Green* a number of employees were terminated for conducting a wildcat strike. Nevertheless following the strike and the resolution of the labor dispute all employees with the exception of African American employees were subject to rehire.

In this case, according to Appellant, following the start of supervisor Braverman held Appellant to the "letter of the law" different than any other officer, according to lead Mr. Franks, then forced him into a reasonable accommodation, ignored the reasonable accommodation and placed Appellant in a position that his doctor clearly did not recommend. Appellant's next management team (Phelps and Blatman-Byers) then "gunned" to terminate Appellant, setting him up for failure, falsely portraying his as violent, constantly criticizing him, making fun of his disability and demeaning him. Given the hostile work environment in which the Appellant had to suffer through for years and years and the evidence establishing the existence of such a hostile work environment, it reasonably can be inferred that the reason for such actions was the fact that he is Nigerian and has a brain injury, and in retaliation for his

consistent complaints for what he viewed as being a hostile work environment based on his race, national origin and disability.[3]

Further, there is simply no question that other adverse employment actions such as denial of leave, harassment, and other adverse actions also transpired while Appellant was working at Green Hill. However, these issues, potentially constituting "adverse actions" are better analyzed as being a byproduct of a retaliatory animus against Appellant's good faith protest against what he believed to be discriminatory context in the workplace.

Preclusion is an affirmative defense and the party asserting it has the burden of proof. See *State Farm v. Avery*, 114 Wn. App. 299, 304, 57 P.3d 300 (2012). Here, it is doubtful that preclusion principles **have any application** in the context of claims brought pursuant to RCW 49.60. et. seq. RCW 49.60.020 provides in part. "Nor shall anything herein contained to be construed to deny the right to any person to institute any action or pursue any remedy or criminal remedy based upon an alleged

[3] Typically the statute of limitation applicable for wrongful termination claims brought pursuant to RCW 49.60.*et seq* is the three-year limitation period set forth within RCW 4.16.080. See *Lewis v. Lockheed Ship Building* 36 Wn. App 607, 613, 676 P.2d 545 (1984). Clearly, given the fact that Mr Emeson was not terminated until after he filed numerous internal discrimination complaints and his EEOC, Human Rights Commission complaint, belies any assertions by the defense that Appellant's claim is barred by the statute of limitations. Clearly the wrongful termination aspects of this case are not. As discussed below the same is true with respect to Appellant's hostile work environment claim.

violation of his or her civil rights.[4] As recognized in *Reese v Sears, Roebuck and Co.*, 107 Wn. 2d 563, 575-76, 731 P.2d 497 (1987) an aggrieved employee can pursue multiple remedies in order to vindicate rights otherwise protected under the terms of the statute.[5] Thus, the legislature contemplated that an employee can pursue multiple remedies in order to further the goals of RCW 49.60 to eradicate discrimination. Thus RCW 49.60.020 should be viewed as a indication that the legislature has chosen to limit the application of claim and/or issue preclusion in lawsuits involving claims of discrimination and/or reprisal brought under the terms of RCW 49.60. et. seq.[6]

Given the language in RCW 49.60.020 it is respectfully suggested that it would simply be impossible for DOC to prove its burden that preclusion principles can even apply.

B. The Federal Court Did Not Address Appellant's State Law Claims In Any Respect, Appellant Did Not Bring State Law or Common Law Claims In Federal Case.

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[4] In 1973 the legislature removed an election of remedies requirement from the terms of RCW 49.60.020. Prior to the 1973 amendment an employee could only pursue one form of remedy in order to vindicate their civil rights. See *State Ex rel The Barb Restaurant's, Inc. v. State Board Against Discrimination*, 73 Wn. 2d 870, 878, 441 P.2d 526 (1968)

[5] *Reese* was overruled on other grounds in *Phillips v. City of Seattle*, 111 Wn. 2d, 903, 907, 766 P.2d 1099 (1989)

[6] In *Carver v State*, 147 Wn. App. 567, 197, P.3d 678 (2008) the Appellate Court upheld the application of collateral estoppel in a discrimination case but did so without taking into consideration the language of RCW 49.60 020 and the Supreme Court's opinion in *Reese*.

Appellant's state law claims are NOT precluded by res judicata or collateral estoppel because the federal court only decided the federal claims (not based on the merit of the claims) and the State Law claims were not before the Federal Court. The Federal Court never reached the issues or facts underlying Appellant's state-law claims (there were no state law or common law causes of action in the Federal case) and dismissed the case without considering the merits of the case denying Appellant's request to dismiss without prejudice. Obviously, res judicata and collateral do not apply in this case because the federal court did not decide any of the state law issues (on the merits or otherwise).

1. *Res Judicata* (Claim Preclusion) and *Collateral Estoppel* Do Not Apply Here.

On the issue whether or not Appellant's claim is estopped due to the federal decision, defendant's assertions fail. First, Appellant's claims are not subject to res judicata and secondly, it is definitely not issue precluded. Appellant's state law and common law claims could only be dismissed if they are identical to the federal claims with the earlier federal case in the following respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005).

Significantly res judicata or "claim preclusion" prohibits the litigation of only claims and issues that were litigated or **could have been litigated in a prior action.** *Pederson v. Potter*, 103 Wn. App. 62, 67 11 P.3d 833 (2000); *Loveridge v. Fred Meyyer, Inc.*, 125 Wn. 2d 759, 763, 887 P.2d 898 (1995). Here it is highly debatable that plaintiff's state law claims could have been hurt at all in a federal district court given the fact that such courts are courts of limited jurisdiction. The US District Court's ability to hear state law claims in a case otherwise brought under its federal question jurisdiction (28 USC § 1331 is governed by 28 USC § 1367. The ability to decide state law claims in an action involving federal question is known as "supplemental and/or pendent jurisdiction. Supplemental jurisdiction is a doctrine of discretion and not a matter of a plaintiff's rights. *Chester Upland School District v. Pennsylvania*, 861 F. Supp. 2d 492, (E.D.P.a. 2012); *DeAsencio v Tyson Foods, Inc.*, 342 F. 3d 301 (3d Cir. 2003). 28 USC § 1367(c)(1)-(4) provides the standard from which a district can utilize in declining to exercise jurisdiction against "supplemental" claims.

Given that a United States district court could exercise its discretion literally at any time during the course of a litigation and declined to exercise its supplemental jurisdiction over state law claims it is highly speculative and dubious that any claims pursuant to RCW 49.60

necessarily "could have" been pursued in the above-referenced dismissed district court action. Given the speculative nature of such an issue, it is respectfully suggested that it would be nearly impossible for DOC to meet its burden to prove that *res judicata* would get applied under the facts and circumstances of this case.

Obviously Appellant has not and is not asserting any federal claims in this state lawsuit. Secondly, four requirements must be met in order for collateral estoppel to apply: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of collateral estoppel must not work an injustice. *World Wide Video of Washington, Inc. v. City of Spokane*, 125 Wn. App. 289, 305, 103 P.3d 1265 (2005).

In this case, not only did the Federal Court NOT decide the State Law claims, especially those under 49.60, in this new lawsuit Appellant has proffered new and substantial evidence. This evidence specifically consists of numerous depositions and discovery evidence not previously produced.

A. Whether Causes of Action Are Identical?

In order to determine whether causes of action are identical, courts consider:

(a) whether rights or interests established in the prior judgment would be destroyed or impaired by the second lawsuit;

(b) whether substantially the same evidence is presented in the two suits;

(c) whether the two suits involve infringement of the same right; and

(d) whether the two suits arise out of the same transactional nucleus of facts.

Hayes v. City of Seattle, 131 Wn.2d 706, 713, 934 P.2d 1179 (1997).

Obviously the federal causes under title VII and 1983 are not identical to the Appellant's causes under RCW 49.60 and the other state law claims.

As discussed above with respect to the *Mackay* and *Scrivener* cases under Washington's version of the "substantial factor" test applied to discrimination, retaliation and hostile work environment claims and employee can still prevail even if otherwise legitimate justifications existed for the employer's actions. The same is simply not true with respect to claims brought pursuant to Title 7 and/or 42 USC § 1981.

It is respectfully suggested that the 9th Circuit's model jury instructions provide reasonable basis to analyze the differences between state and federal law in the area of discrimination. Under the terms of 9th Circuit model Jury Instruction 10.1A when addressing "disparate treatment" ultimately what standards apply depend on the evidence presented at trial and a jury can be instructed with respect to whether or not the discriminatory motive was a "sole reason" or a "motivating factor" in the adverse employment decision at issue. (Which is frankly absurd). Even when a "motivating factor" instruction is given under federal law an employer is provided an affirmative defense which allows it to prove "by a preponderance of the evidence that it would have made the same decision even if it had not taken plaintiff's [protected characteristic] into account. See *Costa v. Desert Palace Inc.*, 299 F.3d 838, 848 (Ninth Cir. 2002) (en banc), Affir'd, 539 U.S. 90 (2013); *Galdamez v. Potter*, 415 F.3d, 1015, 1021, (Ninth Cir. 2005). The effect of placing the employee's and the employer's burden together is that "but for" causation has to be established under federal law which specifically was rejected. It is reminded in *Mackay* a "but for" standard was specifically rejected.

Thus, even if we assume *arguendo* Judge Bryan's decision establishes that legitimate reasons existed for the adverse employment actions taken, that would not necessarily be dispositive of plaintiff's

RCW 49.60. et. seq. claims. That's because even if such legitimate reasons for termination are established as a matter of fact under Washington law the plaintiff can nevertheless prevail if a protected characteristic and/or conduct was a motivating factor in the decision.

The same is true with respect to plaintiff's retaliation claim under RCW 49.60 which also uses a "substantial factor" test. As model Ninth Circuit model Jury Instruction 10.3 establishes under federal law "but for" causation must be established. This is a far higher burden of proof than applicable in Washington. See *University of Texas Medical Center v. Nassar*, 133 S. Ct. 2517, 2534 (2013) (rejecting motivating factor test and retaliation claims).

2. Whether rights or interests established in the prior judgment would be destroyed or impaired by the second lawsuit?

Defendant has not discussed or even attempted to show that its rights or interests would be destroyed or impaired. Appellant's state and federal causes of action were never concurrently joined in Appellant's earlier Federal lawsuit. The federal claims were dismissed but the substance of the Appellant's State law claims were never determined when Judge Bryan dismissed the federal claims - Judge Bryan did not decide those state law claims. If Appellant's state law claims were identical or even presented in conjunction with his federal claims there would be no

doubt that the federal judge would have dismissed all the claims, res judicata may apply. Appellant's state law claims are different than her federal claims, as are the standards of proof (i.e. RCW 49.60 very liberal standard for finding liability). Appellant's state law claims that were not decided by Judge Bryan. The Federal Court did not decide the State law claims under RCW 49.60 and the Court never reached the issues underlying the State law claims.

3. Whether the two suits involve infringement of the same right?

Appellant's Federal Causes of Action claims are completely different than his State law claims as described above. Also, the issues determined by the earlier federal court was not based on the new information obtained in this new State law cause of action. Any questions regarding this must be resolved in a light most favorable to Appellant as the nonmoving party.

4. Whether the Subject Matter is Identical?

Even though the earlier federal lawsuit and the case at hand may arise out of some of the same set of facts, that is not conclusive that the two lawsuits involve the same subject matter. *See Hisle* at 866 (finding different subject matter in where first case sought to invalidate the collective bargaining agreement, and the second case sought to apply the

Minimum Wage Act to the collective bargaining agreement), citing *Hayes* at 712 (finding different subject matter in cases involving a master use permit where the initial case sought to nullify the city council decision and the second case sought damages). Additionally, the Washington Supreme Court recently held that even where the first case did not consider claims of attorney-client privilege and work product, even though everything else about the two cases is identical, res judicata did not bar Appellant's second case. *Spokane Research & Defense Fund* at 99.

The Court in *Hayes* noted that the critical factors in determining whether the subject matter of cases differs, seems to be regarding the nature of the claim or cause of action. *Hayes* at 712. Thus, even if the case at hand and the earlier federal lawsuit both arise out of the same fact patterns, the nature of the claims and causes of action are quite different. Because RCW 49.60 contains a provision requiring liberal construction for the accomplishment of its purposes (RCW 49.60.020) and there is no similar provision contained in federal law, Washington courts are not bound by federal law in interpreting RCW 49.60. *See Galbraith v Tapco Credit Union*, 88 Wn. App. 939, 950, 946 P.2d 1242 (1997); *Marquis v. Spokane*, 130 Wn.2d 97, 110-111, 922 P.2d 43 (1996); and *Allison v. Housing Authority*, 118 Wn.2d 79, 87; 821 P.2d 34 (1991). Consequently,

there is a substantial difference in the legal standards in determining the respective RCW 49.60 claims.

5. RCW 49.60 Has a Completely Different Legal Standard of Proof, a Much More Relaxed, Liberal Standard Than Federal Law.

Collateral estoppel does not apply where a substantial difference in applicable legal standards differentiates otherwise identical issues of mixed law and fact. *Cloud v. Summers*, 98 Wn. App. 724, 730, 991 P.2d 1169 (1999), citing *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291, 1292 (9th Cir. 1971) (explaining that issues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits is the same) and *United States v. Powell*, 494 F. Supp. 260, 263 (S.D. Ga. 1980) (" [I]ssue identity is insufficient to invoke collateral estoppel if the two actions involve different legal standards."); *see also Dias v. Elique*, No. 0415290p (9th Cir. 2006) (issue preclusion may be defeated by shifts in the burden of persuasion or by changes in the degree of persuasion required).

Because RCW 49.60 contains a provision requiring liberal construction for the accomplishment of its purposes and there is no similar provision contained in federal law, Washington courts are not bound by federal law in interpreting RCW 49.60. *See Galbraith v. Tapco Credit Union*, 88 Wn. App. 939, 950, 946 P.2d 1242 (1997); *Marquis v. Spokane*,

130 Wn.2d 97, 110-111, 922 P.2d 43 (1996); and *Allison v Housing Authority*, 118 Wn.2d 79, 87; 821 P.2d 34 (1991).

Therefore, consistent with the express authority of Washington cases and the guidance of federal cases, collateral estoppel should be defeated regarding Appellant's second cause of action, RCW 49.60 because of the substantial difference in the legal standards for in determining respective retaliation cases.

6. Whether the application of collateral estoppel would work an injustice?

The collateral estoppel doctrine is a means of preventing the " endless relitigation of issues" , promoting judicial economy, and preventing inconvenience or harassment of the parties. *Reninger v. Dep't of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1996).

The Federal Court's decision to dismiss Appellant's federal claims (based on Appellant's non-response and denying Appellant's motion to dismiss that case without prejudice-an absolute right) are inconsistent with any position Defendant might now take claiming that it should be protected from a re-litigation of issues that are State claims. Appellant would now suffer irreparable injury by being prohibited from having his day in court if Defendant was allowed to use a completely different standard to impact the state law claims.

The Court observed:

> " the doctrine of collateral estoppel may be qualified or rejected when its application would contravene public policy. This, of course is a fundamental aspect of the doctrine. It must not apply so rigidly as to defeat the ends of justice, or to work an injustice." The public policy consideration in Appellant's case are clearly maintained under RCW 49.60.030(1), the Appellant has a right to be free from discrimination because of her disability... (49.60.030(1)(a) the right to obtain and hold employment without discrimination, and the right not to be discharged from employment because of a disability. RCW 49.60.180(2).

Collateral estoppel may be applied to preclude " only those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding." *Christianson*, 152 Wn. 2d. At 307. The Federal Court in this case did not reach the issues underlying the State Claims.

C. Appellant Has Valid Claims For Hostile Work Environment Based on his National Origin, Race and Disability Harassment.

The Court can further take note that the dismissal procured by the defense in Federal Court was peculiar. Under Washington's version of CR 41(a)(1)(B) a plaintiff can dismiss their case any time before resting his case in chief. See *Greenlaw v Renn*, 64 Wn. App. 499, 8234 P.2d 1263 (1992) (plaintiff has a right to take a voluntary non-suit without prejudice, even if the defendant has filed a motion for summary judgment

which has yet to be heard). Had this case been in State Court all along the case certainly never would have been dismissed on the grounds that it was in the Federal Court.

The elements of Appellants' hostile work environment claim are set forth in WPI 330.23 which under the heading of "Workplace Harassment – Hostile Work Environment – Burden of Proof" provides the following:

> "To prove her claim of harassment on the basis of national origin/race/and/or disability, Appellant has the burden of proof to each of the following propositions;
>
> (1) That there was language of conduct concerning national origin/race/and/or disability;
>
> (2) That this language or conduct was unwelcome in the sense that Appellant regarded the conduct as undesirable and defensive and did not solicit it or incite it;
>
> (3) That this conduct or language was so offensive or pervasive as to alter the terms and conditions of Appellant's employment; and
>
> (4) Either:

(a) The owner manager, partner or corporate officer of the employer participated in the conduct or language; or

(b) The management knew, through complaints or other circumstances, of the conduct or language and the employer failed to take reasonably prompt and adequate corrective actions reasonably designed to end it; or

(c) The management should have known of this harassment because it was so pervasive or through other circumstances: and the employer failed to take reasonably prompt and adequate corrective actions reasonably designed to end it ....

Based on the above-referenced facts it would be hard to imagine that any court can possibly conclude that Appellant was not a victim of a national origin/race/and/or disability hostile work environment. Appellant had to suffer through not only language but also conduct derisive and/or derogatory towards his national origin/race and/or disability. He also had to respond to racial stereotyping, racial jokes and names, ridicule of his accent, mimicking of his disability on Facebook by management and

insults. Clearly, such conduct was unwanted and was not incited by the Appellant who repeatedly complained about such actions.

Additionally, there is simply no question that given the formal nature of his complaints, and the fact that upper-level management was perpetrating some of the conduct and/or was not responsive directly to his complaints, the imputation of such actions to the employer clearly would be appropriate under the facts and circumstances of this case.

As indicated above not only are claims for disparate treatment being brought (particularly as it relates to Appellant's termination) but also Appellant is contending that he was a victim of a national origin/race/and/or disability hostile environment.

As it is, it is respectfully submitted that the Court of Appeals Division II's opinion of the case of *Short v. Battleground School District* 169 Wn. App. 188, 279 P.3d 902 (2012) is analytically unsustainable particularly given the commands of RCW 49.60.010 which requires that the statutory scheme be interpreted in a manner which most effectively eradicates discrimination within work environments, here in the State of Washington. See *Bennett v. Hardy* 113 Wn.2d 912, 927-28, 784 P.2d 1258 (1990); see also *Mackay v Acorn Custom Cabinetry, supra.*

The amendment to RCW 49.60 which added "handicap" (disability) to the protected statutes protected under the statutory scheme

did not specifically require that an employer reasonably accommodate handicapped employees. However, in *Holland v. Boeing Co.*, 90 Wn.2d 384, 583 P.2d 621 (1978) the Supreme Court found that such a duty to accommodate was implicit in the prohibition against handicapped discrimination which then recently been added to the statutory scheme. The Supreme Court reasoned that given the nature of the protected status (disability) in order for the statutory protections to be meaningful a duty to reasonably accommodate logically had to be imposed.

Finally, with respect to Appellant's hostile work environment claim it is respectfully suggested that the defense's contention that this claim is barred by statute of limitations borders on the frivolous. As the Court should no doubt be aware hostile work environment claims as it relates to statute of limitations are somewhat unique. As discussed in the Supreme Court's opinion in *Antonius v. King County* 153 Wn.2d 256, 261-69, 103 P.3d 724 (2004). Under *Antonius* although discrimination claims generally have a three-year statute of limitation when a hostile work environment is at issue the objectionable practice does not occur on any particular day, thus it is impossible to calculate the three-year time frame under normal circumstances. Under the terms of *Antonius* if any of the conduct throughout the time the acts occurred can be considered if the Appellant presents evidence that one or more of the acts took place within

three years from when the lawsuit was filed. Under the terms of *Antonius* the Court's obligation is to determine whether the acts about which the employee complains are part of the same actionable hostile work environment practice and if so whether any acts fall within the statutory time period. *Id.* see also *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn. App. 176, 195, 222 P.3d 1119 (2009).

In this case, there is no question that Appellant has been a victim of a continuous hostile work environment. According to Appellant, despite the fact that there were formal investigations into his complaints the harassment and ridicule based on his national origin/race/and/or disability never stopped. Here, there is no question that the entire "hostile work environment" otherwise remains actionable.[7]

Under the terms of Washington's antidiscrimination law, as noted above, all that needs to be established in order to meet this element is that the employer knew or should have known of the alleged harassment and/or unlawful discriminatory behavior. On this issue the case of *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 792, 98 P.3d 1264 (2004) is instructive. In *Perry*, an employee filed a formal complaint of sexual

[7] Even assuming *arguendo* that some or part of Appellant's hostile work environment claims are time barred, nevertheless, evidence of discriminatory treatment occurring before the limitation period is admissible to show a pattern of illegal conduct, purpose or motivation with regard to either independent violations that occur after the limitation period or to continuing violations that begin before and continue after the limitations. See *Henderson v. Pennwalt Corp.* 41 Wn. App. 547, 553, 704 P.2d 1256 (1985).

harassment against a co-worker who was making inappropriate advances and comments towards her. Following such a complaint, the employer took low-level corrective action against the employee who had engaged in egregious harassment. Such "remedial" efforts included requiring that he transfer to a different shift than the Appellant and that he undergo three hours of sensitivity training. In response the employee ultimately initiated her own transfer away from her alleged harasser. Unfortunately, despite the Appellant's efforts at Costco to get away from her harasser he nevertheless continued to "stalk" her at her new worksite and would stare at her in an extremely uncomfortable manner. In *Perry*, the court found that the employer's efforts at remediation were inadequate and upheld a trial court's determination and judgment in that regard. At Page 802 of the *Perry* opinion, the following was provided:

> "Costco also challenges the conclusion of the trial court that its remedial actions were legally inadequate. The trial court did not err. Conclusion of Law 8 states 'The remedial actions taken by Costco in response to Ms. Perry's sexual harassment claim were legally insufficient.' Conclusion of Law 9 states: A remedy which simply transfers the sexual harasser to another shift or location, without doing anything to prevent continued sexual harassment by the harasser, is legally insufficient under Washington law, as it does not stop the illegal conduct. It is not enough simply to stop the sexual harassment of the Appellant,

when the harasser's left free to sexually harass others. Such a resolve is inconsistent with the law and the spirit of the WLAD. Costco contends that these conclusions are erroneous because Smith's harassment of Perry did stop. As noted above, Costco is mistaken. Smith continued to victimize Perry by stalking her at the Federal Way store. Costco contends that its remedial actions were appropriate and adequate to address Smith's harassing behavior. We disagree. *Ellison* is instructive here. In *Ellison* the 9th Circuit addressed the sufficiency of an employer's remedial actions. There, Ellison was subject to harassment by a co-worker, Gray, who persisted in asking her out to lunch, despite rejections, and wrote her two disturbing letters about crying over her, "experience, her from afar and his hopes for a more intimate relationship. In response to Ellison's complaints, the employer transferred Gray to another office for six months but decided, following a union grievance procedure instituted by Gray, to transfer him back to Ellison's office. The employer informed Ellison that it thought the six month separation was sufficient and if the problem reoccurred, it would take additional actions. The 9th Circuit concluded that genuine issues of material fact existed concerning the adequacy of these remedial measures. It is cited the fact that the employer apparently only told Gray to stop harassing Ellison, but it failed to express strong disapproval of Gray's conduct, it did not reprimand him or put him on probation, and did not did not inform him that repeated harassment, would result in suspension or termination. (See also *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

Similarly, although once Appellant filed formal complaints there were investigations performed. that did not stop the harassment. It appears that no one was not subject to any significant punitive measures. The harassment never changed as far as intensity, and nevertheless continued and was coupled now with acts of administrative retaliation. Like the Costco Appellant, the Appellant continued to be subjected to harassment, and ultimately subjected to termination, under highly suspect circumstances. Under the standards set forth in *Perry* it is respectfully suggested that there are wide-ranging question of fact with respect to the adequacy of DOC's remedial efforts in response to the Appellant's significant and very serious complaints of harassment.

D. Appellant's National Origin/Race and/or Disability Harassment Claims Are Not Time Barred.

The WLAD does not contain its own statute of limitations. But generally discrimination claims must be brought within three years under the general statute of limitation applicant for personal injury in the State of Washington. See *Antonius v. King County* 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004); RCW 4.16.080(2). For discreet discriminatory acts or retaliatory acts, such as a termination, the limitation period begins to run

from the date of the alleged wrongful act. *Antonius* 153 Wn.2d at 264. If the limitation period is run, a cause of action arising from the discreet act is barred. Id.

However, hostile work and current environment claims are different. A hostile work environment occurs over a series of days or perhaps years and such claims are based on the cumulative effect of the individual acts. *Antonius* 153 at 264. Because of the unique nature of a hostile work environment claim in *Antonius* the Supreme Court allowed a Appellant to recover for all related conducts straddling the statute of limitation period. Id. Under the terms of *Antonius* and assessing the statute of limitations for a hostile work environment claim "a court's task is to determine whether the acts about which an employee complains of are part of the same actual hostile work environment practiced, and if so, whether any act falls within the statutory time period."

The standard for linking discriminatory acts together in the hostile work environment context is not particularly high. "The acts must have some relationship to each other to constitute part of the same hostile work environment claim." See *Antonius* 153 Wn.2d at 271. See also *Cox v. Oasis Physical Therapy, PLLC*, 163 Wn.App. 176, 195-96, 222 P.3d 1119

(2009)[8]. In this case, as evidenced by the above-referenced statement of facts, there is simply no question that Appellants' claims of harassment straddle the three-year time frame otherwise applicable to claims brought pursuant to RCW 49.60.et.seq. As all such claims involve DOC management and supervisory staff, at a minimum a question of fact as to whether or not the conduct alleged by the Appellant is part of the same hostile work environment claim. As indicated, establishing that one or more of these acts was based on the same discriminatory animus is not intended to be a particularly onerous requirement and given the harassment in this matter is being perpetrated by the same individual such a determination can easily be made. As indicated by *Antonius* at 268 the Supreme Court disfavors the notion of trying to parse a hostile work environment claim into its component parts for statute of limitation purposes

In this case, the court should find that none of Appellants' claims related to hostile work environment are time barred or at least there is a question of fact with such issue.

[8] Even outside of the hostile work environment context evidence of discriminatory treatment occurring before the limitation period is admissible to show a pattern of the legal conduct, purpose or motivation with regard to either independent violations that occurred after the limitation period or to continuing violations that began before and continued after the limitation period. See *Henderson v Pennwalt Corp* 41 Wn.App 547, 553, 704 P.2d 1257 (1985).

E. Appellant Has Valid Retaliation Claims.

RCW 49.60.210 provides under the heading of "Unfair practices – discrimination against a person opposing unfair practice – retaliation against whistle blowing" the following:

> (1) It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified or assisted in any proceeding under this chapter.

The elements of a retaliation claim brought pursuant to RCW 49 60.210 are set forth at WPI 330.5 which provides under the heading "Employment discrimination – retaliation – the following:

> It is unlawful for an employer to retaliate against a person for opposing what the person reasonably believed to be discrimination on the basis of religion and/or race or providing information to or participating in a proceeding to determine whether discrimination or retaliation occurred.
>
> To establish a claim of unlawful retaliation by the Appellants the Appellants have the burden of proving each of the following propositions:
>
> (1) That the Appellants opposed what they reasonably believed to be discrimination on the basis of national origin/race/and/or disability or provided information to/participated in a proceeding to determine whether

> discrimination or retaliation has occurred and (2) That a substantial factor in the decision to [take adverse action] was the Appellant's opposition to which he reasonably believed to be discrimination or retaliation or providing information to/participating in/a proceeding to determine whether discrimination or retaliation has occurred.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the Appellants on this claim. On the other hand if any of these propositions have not been proved your verdict should be for the defendant.
>
> The Appellants do not have to prove that his opposition/participation/was or were the only factor or the main factor in the employer's decision, nor does the Appellant have to prove he would not have been subject to discipline but for his opposition or/participation. (Modified for context).

A substantial causation factor is applicable to retaliation claims brought pursuant to this statute. See *Schonauer v. DCR Entertainment, Inc*, 79 Wn.App. 808, 827, 905 P.2d 392 (1995); *Allison v. Housing Authority*, 118 Wn.2d 79, 821 P2d 34 (1991). In other words, liability can be imposed when the statutorily protected activity was "a substantial factor" in the employer's adverse employment decision.

In order for an employee to establish that they have engaged in protected opposition activity under the terms of the statute all that is

necessary is that the employee establish that they had a good faith basis to believe that discrimination was occurring and it is unnecessary for the employee to establish actual discrimination or an actual violation of the law prior to being afforded the protection of this statute. See *Renz v. Spokane Eye Clinic*, P.S. 114 Wn.App. 611, 60 P.3d 106 (2002). What is or is not protected "opposition" activity is broadly defined under the WLAD. See *Lodis v. Corbs Holdings, Inc.*, 172 Wn.App. 835, 850. 292 P.3d 779 (2013). Internal complaints are sufficient to trigger the protection of the opposition clause. See *Renz v. Spokane Eye Clinic*, *Supra*. See also *Ray v. Henderson*. 217 F.3d 1234 (9th Cir. 2000) (making formal complaints to supervisor is protected opposition activity under federal law).[9]

For the purposes of the anti-retaliation provision set forth in RCW 49.60.210. "adverse employment actions" have been defined to mean any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. See *Ray v. Henderson*, 217 F.3d at 1242-43, relying on EEOC Compliance Manual Section 8 (1998). As discussed in *Ray*, not

[9] It is noted that following the *Hiatt* opinion and when Appellant was making his complaints it was still an open question in Washington as to whether or not an employer had an obligation to engage in religious accommodations. Thus, it would be baseless to contend that Appellant did not have at least a "good faith" belief that he was imposing illegal conduct.

only can an adverse action come in the form of tangible loss of employment benefits such as which occurs when someone is terminated, demoted and the like, but also it can include retaliatory on-the-job harassment which is reasonably likely to deter protected opposition activities. *Id.* See also *Harrell v Washington*, 170 Wn.App. 386, 398, 285 P.3d 159 (2012) (a demotion or adverse transfer, or a hostile work environment may amount to an adverse employment action, citing to *Kirby v. City of Tacoma*, 124 Wn.App. 454, 465, 98 P.3d 827 (2004). Stated another way, adverse employment action means a tangible change in employment status such as "hiring, firing, failing to promote, reassignment with significant different responsibilities or a decision causing a significant change in benefits". See *Crownover v State*, 165 Wn.App. 131, 148, 265 P.3d 971 (2011).

Whether or not something is an "adverse employment action" should be judged from the perspective of a reasonable person in the Appellant's position. *Tyner v. State*, 137 Wn.App. 545, 565, 154 P.3d 920 (2007).

In this case, a reasonable jury should have little difficulty in finding that the Appellant was subject to a hostile work environment as a form of retaliation because of his opposition activity.

As indicated by the Appellant. once he raised issues with respect to his national origin/race/and/or disability discrimination to his direct manager he was treated poorly by his management. set up for discipline and termination, chastised, denied sick leave and portrayed as violent. He was subject to threats of firing and ultimately terminated from his state job.

From the fact pattern presented to the Court, a reasonable jury could easily conclude that Appellant was a victim of retaliation for his protected opposition and/or other protected conduct. Thus, at a minimum there should be deemed a question of fact as to whether or not adverse employment actions occurred in this matter.

Additionally. it is well recognized that employers rarely openly reveal that they have a retaliatory motive for their adverse employment actions. See *Renz v. Spokane Eye Clinic*. P.S. 114 Wn.App. at 621, citing to *Kahn v. Salerno*, 90 Wn.App. 110, 130. 951 P.2d 321 (1998). An employee can establish a "*prima facie*" case of retaliation for opposition activity by showing that he engaged in such activity, the employer knew of such opposition activity and the employee was subject to an adverse action. *Id.* An employee is not required to produce "direct" or "smoking gun" evidence in order to establish the existence or a question of fact with respect to unlawful motivations. *Id.* Circumstantial or indirect evidence

in and of itself is sufficient. See also *Rice v. Offshore Systems, Inc.*, 167 Wn.App. at 89. One factor in supporting a retaliatory motive is the close proximity in time between the protected activity and the adverse employment actions. See *Hollenback v Shriners Hospital*, 149 Wn.App. 810, 823-24, 206, 337 (2009). When the record contains reasonable but competing inferences both with respect to retaliatory and non-retaliatory reasons for the employer's actions then there's a question of fact which much be decided at the time of trial. See *Estevez v. Faculty Club of The University of Washington*, 129 Wn.App. 774, 801-04, 120 P.3d 579 (2005).

Based on the facts presented by the Appellant's claim, retaliatory intent can reasonably be inferred. Appellant made numerous complaints to the DOC, the Human Rights Commission and the EEOC and was directly retaliated against afterwards. Thus, under the circumstances of this case it would be highly inappropriate to dismiss Appellant's claims of retaliation.

F. Appellant Has Valid Claims For Violation Of Privacy.

Further, plaintiff's invasion of privacy claim should not have been dismissed as time barred because it is governed by RCW 4.16.080. the three-year statute of limitation generally applicable to personal injury. It

is noted that below the defense cited to the case of *Eastwood v. Cascade Broadcasting Co.*, 106 Wn. 2d 466, 722 P.2d 1295 (1986) for the proposition that the two-year statute of limitation applicable to defamation (liable and slander) applied to a "invasion of privacy claim". See RCW 4.16.100. However, *Eastwood* involved a "false light invasion of privacy claim which is essentially a species of defamation. In *Eastwood* the Appellate Court reasoned that since a "false light" invasion of privacy is very similar to a claim of "defamation" the same statute of limitations should apply. See *St. Michelle v. Robinson*, 52 Wn. App. 309, 759 P.2d 467 (1988) (explaining *Eastwood* opinion as being a case where the court applied a two-year statute of limitations to a "false light" invasion of privacy claim out of concern that if it did not do so the cause of action would supplant claims of defamation).

Here, what is at issue is an improper disclosure of private medical facts. See *Berger v. Sonneland*, 144 Wn. 91, 26 P.3d 257 (2001) which is far more akin to a standard personal injury claim and/or infliction of emotional distress claim which otherwise has a three-year statute of limitation. See *St Michelle*, supra.

Additionally, the trial court's determination that because the disclosure of such private facts was an "intentional" tort that such action could not be imputed to the employer. Such a determination is simply

wrong under respondiac's superior principles. *Roundup Corp.*, 148 Wn. 2d 35, 52-53, 59 P.3d 611 (2002). As the *Rabelle* case establishes simply because a "intention" tort occurs in the work environment does not necessarily mean that it is outside the scope of employment. There is no "per say" rule excluding such matters.

Here, the employee posted offensive materials on "Facebook" learned the information as an employee and was discussing the matter publicly and with other coworkers. Thus, it cannot be said that the conduct was so far removed from employment that *respondiate's* superior principles otherwise would not apply.

Washington has adopted the Restatement of Torts definition for its common law action for invasion of privacy:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of the kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public

Restatement (2nd) of Torts Sec. 625D; *Reid v. Pierce County*, 136 Wn.2d 195, 205. 961 P.2d 333 (1998) ("So that no further confusion exists, we explicitly hold the common law right of privacy exists in this state that individuals may bring a cause of action for invasion of that right."); *Hearst v. Hope*, 90 Wn.2d 123, 135-136. 580 P.2d 246 (1978)

Virgil v. Time, Inc., 527 F.2d 1122, 1125-1126 (9th Cir. 1975).

In support of this claim, Appellants will prove the following elements:

(1) That through Facebook, Supervisor Phelps gave publicity to a matter concerning the private life of Appellant;

(2) That the matter publicized would be highly offensive to a reasonable person; and,

(3) That the matter publicized was not of legitimate public concern.

This is a classic invasion of privacy claim, pure and simple; importantly, malice need not be shown and "ordinary care" is not a defense.

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals to his family or close personal friends. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.

Cowles Publishing Co. v. State Patrol, 109 Wn.2d 712, 721, 748 P.2d 597 (1998); *Reid v. Pierce County*, 136 Wn.2d at 210.

In this case, manager Phelps was making fun of Appellant's

disability on Facebook and Phelps testified that she did not know better and it was not intentional. Another co-worker complained about this to Eldon Vail, DOC's Secretary and highest authority. CP 647, 732-733. Appellant filed a grievance against Phelps regarding the "Facebook fiasco" on May 25, 2010, so it was obviously offensive to Appellant or a reasonable person to publicize personal information that he had a disability. Appellant obviously has a claim here.

G. Appellant Was Not Reasonably Accommodated.

The inquiry into whether a proposed accommodation is reasonable and whether a reasonable accommodation poses an undue hardship cannot be described as clear and distinct. The concepts of "reasonable accommodation" and "undue hardship" derive principally from the federal Rehabilitation Act of 1973. In case law interpreting that act, "[t]he defense of undue hardship is sometimes merged with and treated as part of the question of reasonable accommodation." *Easley v. Sea-Land*, 99 Wn. App 459, 994 P.2d 271 (2000). Washington case law also demonstrates the close relationship between reasonable accommodation and undue hardship. In *Phillips v. City of Seattle*, a case involving a claim of disability discrimination based on alcoholism, the Washington Supreme Court characterized this issue as an either/or inquiry:

> It is a jury question whether the employer's actions constituted a reasonable accommodation or whether the employee's requests would have placed an undue burden on the employer. Phillips requested his job be kept open until he completed an inpatient treatment program. The City refused. Whether keeping his job open was an undue burden or a reasonable accommodation was a question for the jury. [994 P.2d 278)

The Supreme Court thus described the inquiry as an either/or question--a reasonable accommodation or an undue burden. Surely a reasonable juror might conclude likewise--and without instruction to the contrary, would place the burden of proof entirely on the employee. In *Sharpe v. American Tel. & Telegraph Co.*, the Court noted that the correct focus is whether the accommodation the employer actually provided was reasonable, because the law does not require an employer to offer the employee the precise accommodation requested. The court went on to explain Phillips: "In other words, having refused to accommodate, the employer must show that any reasonable accommodation, including one proposed by the employee, would have imposed an undue burden." Appellant's doctor specifically rejected DOC's proposal that Appellant work as a receptionist/office assistant. Dr. Corthell specifically rejected Mr. Emeson from working as an office assistant because "elements of this job description do not take into account Mr. Emeson's limitations due to

his traumatic brain injury." CP 978. Dr. Corthell further referred the DOC to the "ability to multi-task, prioritize and complete work assignments in a fast-paced deadline oriented environment and effectively handle highly stressful, adverse situations, making good decisions and working calmly and accurately." CP 978. Despite Dr. Corthell not recommending this the office assistant position, DOC forced Appellant into the position, essentially setting him up for failure and termination. Id. Clearly DOC failed to reasonably accommodate Appellant and forced him into a position in which he would fail. DOC has made no showing that accommodating Appellant would have been an undue burden and cannot submit new evidence in their reply. This matter should go to a jury.

VI. CONCLUSION

Appellant requests that this Court reverse and remand.

Executed this 6 day of October, 2014, at Lakewood, Washington.

By:
Thaddeus Martin, WSBA No. 28175
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND THAT I PLACED FOR SERVICE OF THE FOREGOING DOCUMENT ON THE FOLLOWING PARTIES IN THE FOLLOWING MANNER(S):

Garth Ahearn Attorney General's Office 1250 Pacific Ave, Ste 105 Tacoma, WA 98402

[XXX] by causing a full, true, and correct copy thereof to be E-MAILED to the party at their last known email address, per prior agreement of the parties, on the date set forth below followed by regular mail.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Tacoma, Washington on the 6 day of ~~August~~ October, 2014.

Kara Denny

Kara Denny, Legal Assistant

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